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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

—o—

AVERIL D. VALLIER, AVERIL D. VALLIER, A Professional Corporation, and BRYON L. KIEMELE,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

—o—

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Real Party in Interest.

—o—

PETITION FOR WRIT OF CERTIORARI OR MANDAMUS TO THE NINTH CIRCUIT COURT OF APPEALS

—o—

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QUESTIONS PRESENTED

1. Should this Court's decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* be overruled or limited to preclude an independent action for fraud upon the court for classically intrinsic fraud or, alternatively, to permit an action on this basis only in matters of great public importance?

2. Should a party alleging fraud upon the court be permitted to relitigate the underlying action as a means of proving such fraud?

LIST OF PARTIES/RELATED ENTITIES

1. All parties to the proceeding in the court below are listed in the caption.

2. Petitioners do not know Southern Pacific Transportation Company's corporate affiliations.

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In The

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AVERIL D. VALLIER, AVERIL D. VALLIER, A Professional Corporation, and BRYON L. KIEMELE,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI OR MANDAMUS TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioners Averil D. Vallier, Averil D. Vallier, a Professional Corporation, and Bryon L. Kiemele, respectfully pray that a Writ of Certiorari issue to review the judgment and decision of Court of Appeals for the Ninth Circuit, entered in this proceeding on April 4, 1988.

Alternatively, petitioners pray that the Court issue a Writ of Mandamus to review the judgment and decision of the United States District Court for the Central District of California entered in this proceeding on January 14, 1988.

OPINIONS BELOW

The opinion of the District Court is not published. It is reproduced in the Appendix hereto at pages 1 to 6.

The opinion of the Ninth Circuit Court of Appeals denying petition for writ of mandate, prohibition or other appropriate relief is not published; it is reproduced in the Appendix at page 7.

JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. section 1254(1). The Court also has jurisdiction under 28 U.S.C. section 1651 to issue an appropriate original writ to the District Court.

STATUTE INVOLVED

This case involves Federal Rules of Civil Procedure, Rule 60, subdivision (b), which states:

> "(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

This case involves a claimed "fraud upon the court" in an underlying action entitled *Kiemele v. Southern Pacific Transportation Company.* This underlying action involved a claim of personal injury sustained by an employee of Southern Pacific in a "break-in-two" accident occurring on March 21, 1978. It resulted in a judgment in favor of the plaintiff, Bryon Kiemele, in April 1984.

Substantially more than one year later Southern Pacific filed this action seeking to vacate the underlying judgment and requesting ancillary relief. The suit charges that the *Kiemele* action was the result of a fraud upon the

court, that Kiemele was injured off the job and staged the break-in-two, that Kiemele and others perjured themselves and that Averil D. Vallier, Kiemele's original attorney (but not the trial attorney) knew these facts and assisted in the presentation of a false and perjured case.

Discovery has established that the lawsuit rests on the testimony of Stephen Fitzgerald. Fitzgerald is an attorney who once worked for Vallier and borrowed money from him. After leaving Vallier's employ Fitzgerald stopped making payments on his debt to Vallier. When Vallier sued for payment, Fitzgerald threatened to accuse him of presenting a false and perjured case in *Kiemele,* unless the suit was dropped and the debt forgotten. Vallier refused to be extorted and Fitzgerald made good on his threat.

Fitzgerald claims that within four months of the time he began working for Vallier (while returning from a deposition where his presence cannot be established), Vallier gratuitously volunteered that Kiemele had really been injured in an off-the-job motorcycle accident and had staged the on-the-job accident so he could claim compensation. Fitzgerald never reported this alleged conversation to anyone; he continued to work on the case without attempting to confirm or disprove Vallier's supposed statements and without seeing anything in the evidence to suggest the truth was other than as found by the jury.[1]

---

[1] The witnesses to the accident have confirmed their original testimony. A physician has testified to the effect that Kiemele's back injuries were so severe that he could not have functioned as he had prior to the accident if he had experienced these injuries prior to the break-in-two.

Confronting a clear and convincing standard of proof, and lacking any corroboration of Fitzgerald's testimony, Southern Pacific intends to try to prove its case by relitigating the underlying personal injury action.

The trial court invited defendants to frame some of the basic legal issues by way of motions in limine. Defendants did so, arguing, inter alia, that the District Court cannot entertain the action because the alleged conduct does not amount to a fraud upon the court for purposes of an independent action more than one year after entry of judgment and, in any event, the underlying action cannot be relitigated in this proceeding. The District Court ruled against defendants. After the court declined to certify questions for interlocutory appeal, defendants petitioned the Court of Appeals for relief. The petition was summarily denied.

At the time the petition was filed in the Court of Appeals, the case was set for trial in June, 1988. This date was subsequently vacated. The District Court recently set trial for September 6, 1988.

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REASONS FOR GRANTING REVIEW

I.

TO PERMIT AN INDEPENDENT ACTION FOR FRAUD UPON THE COURT, THE FRAUD MUST BE EXTRINSIC IN NATURE. TO THE EXTENT HAZEL-ATLAS PERMITS SUCH AN ACTION FOR FRAUD OF AN INTRINSIC NATURE, IT FRUSTRATES THE STRONG POLICY FAVORING FINALITY OF JUDGMENTS, SANCTIONS ABUSIVE LITIGATION, AND HOPELESSLY CONFUSES THE SCHEME OF RULE 60(b). IT DOES SO WITHOUT COUNTERVAILING REASON EXCEPT, POSSIBLY, IN MATTERS OF GREAT PUBLIC IMPORTANCE.

Rule 60(b), Federal Rules of Civil Procedure describes the circumstances under which a judgment may be set aside for fraud. Within one year after entry, the judgment may be set aside for fraud of any kind under Rule 60(b)(3). However, the rule by its terms does not "limit the power of a court to entertain an independent action to relieve a party from a judgment . . . to grant relief to a defendant not actually personally notified . . . or to set aside a judgment for fraud upon the court"; such an independent action may be brought at any time. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 255 (1944).

For many reasons, public policy strongly favors finality of judgments. Progress is impossible if the books on the past cannot be closed. A life may be wasted by an endless loop reliving the past. Though no lawsuit accomplishes perfect justice, it is in the best interests of the parties and, more importantly, of society at large that a

final judgment mark the end of litigation in all but the most exceptional circumstances, so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields,* 18 F.Cas. 532, 539 (C.C.D. Mass. 1841).

A lax standard for reopening judgments threatens not only to clog the courts with repetitious litigation but to undermine the quality of judicial decision-making.

> "The rule that the final judgment governs the future induces the parties to focus all their efforts in a single proceeding. If they know that the judgment will establish their rights once and for all, they will bring to bear the information and energies necessary to produce an informed decision. If they believe that they can have a second try, they are more likely to skimp the first time around, and as a result the judicial process will become less accurate."

Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 830 (7th Cir. 1985).

If the nature of the fraud sufficient to permit an independent action to set aside a judgment more than one year after entry is not carefully limited, these policy considerations are defeated. Moreover, an expansive reading of the grounds for an independent action would render the time limitations of Rule 60(b)(3) superfluous.

There is some confusion whether this Court's endorsement of the traditional view—that an independent action will not lie for intrinsic fraud—in *United States v. Throckmorton,* 98 U.S. 61 (1878) was undermined or abandoned by *Marshall v. Holmes,* 141 U.S. 589 (1891). The Third Circuit is firmly of the view that *Throckmorton* does not survive *Marshall. Averbach v. Rival Mfg. Co.,* 809 F.2d

1016 (3d Cir. 1987); *Publicker v. Shallcross,* 106 F.2d 949, 950 (3d Cir. 1939), cert. denied, 308 U.S. 624 (1940). The Ninth Circuit is just as firmly committed to the opposite view. E.g., *Wood v. McEwen,* 644 F.2d 797, 801 (9th Cir. 1981) cert. denied, 455 U.S. 942 (1982).

One respected text notes that despite expressed doubts, most federal courts continue to adhere, at least in statement, to the *Throckmorton* dichotomy of intrinsic and extrinsic fraud. 7 Moore's Federal Practice, sec. 60.37[1] (2d ed. 1987).

If an independent action may be maintained at any time without regard to the nature of the alleged fraud under the first provision of Rule 60(b)'s savings clause, i.e., if the intrinsic-extrinsic distinction is meaningless, then it is pointless to attempt to define fraud upon the court since it would be swallowed by its predecessor provision. Hence the very fact that Rule 60(b) has separate provisions for an independent action and for fraud upon the court strongly suggests that the rule embodies endorsement of the traditional intrinsic-extrinsic distinction. Similarly, the formulation of the rule underscores the necessity of defining "fraud upon the court" in a manner that is consistent with the intrinsic-extrinsic distinction and does not, in its turn, swallow its predecessor provision. E.g., 11 Wright & Miller, Federal Practice & Procedure, sec. 2870, p. 253 (1973) ("Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b)"); *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663, 668 (5th Cir. 1981).

The *Hazel-Atlas* decision greatly compounds the confusion caused by the *Throckmorton-Marshall* tension. In *Hazel-Atlas* the court found a fraud upon the court where Hartford's attorney had written an article published under the name of an ostensibly disinterested expert. This article played a prominent role in Hartford's patent application and later action for patent infringement. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. at 240.

Unfortunately, *Hazel-Atlas* paid no attention to whether this conduct constituted fraud of a kind that could and should have been exposed in the underlying proceedings, i.e., intrinsic fraud, or was fraud of a kind occurring outside the reach of the litigation tools expected to pierce falsity, i.e., extrinsic fraud.

Because fraud upon the court is normally understood to stand in contradistinction to other types of fraud, *Hazel-Atlas* is difficult to understand. Some courts understand the case to mean that because an attorney is an officer of the court, any fraud allegedly involving an attorney constitutes a fraud upon the court. That is the premise upon which the instant action has been allowed to proceed.

To the extent *Hazel-Atlas* treats alleged attorney involvement in fraud as sufficient of itself to constitute fraud upon the court, the case should be disapproved. Alternatively, the case should be limited to matters involving issues of significant public importance and not just the concerns of the particular litigants.

The reason intrinsic fraud is generally regarded as not permitting an independent action to vacate a judgment is that the adversary system is designed to enable a party

to pierce perjury and false evidence. "The possibility of a witness testifying falsely is always a risk in our judicial process, but there are safeguards within the system to guard against such risks. The most basic of these is cross-examination of witnesses. . . ." *Lockwood v. Bowles,* 46 F.R.D. 625, 632-633 (D.D.C. 1969). The legal system both expects and demands that litigants will make every effort to expose such classically intrinsic fraud at trial. *Great Coastal Exp. v. International Broth., etc.,* 675 F.2d 1349, 1357 (4th Cir. 1982); *Metlyn Realty Corp. v. Esmark,* 763 F.2d at 833.

The presentation of perjured testimony or false evidence always involves a lawyer unless the proponent of the evidence is acting as his own lawyer. This fact may warrant disciplinary or criminal proceedings against the lawyer. It does not, however, affect the adversary's ability or incentive to pierce the fraud, whether the attorney's complicity is willing or unwilling. In short, there is no justification for treating intrinsic fraud as fraud upon the court merely because a party alleges his adversary's attorney was a willing party to the fraud.

Fraud upon the court should be limited to those cases where there has been conduct fundamentally corrupting the judicial process itself, nullifying the effect of internal mechanisms sufficient to expose corruption within the framework of the system. See, e.g., 7 Moore's Federal Practice, sec. 60.33 (2d ed. 1987).

Hazel-Atlas pushes the concept of fraud upon the court "to its furthest, and some think an unjustified, ex-

treme." *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1983), cert. denied, 462 U.S. 1707 (1983). *Hazel-Atlas* works only where a case involves issues of so much public consequence—like the issue of patent validity in *Hazel-Atlas*—that public interests outweigh the general policy favoring finality of judgments. This, however, is a public policy exception to the principle of finality of judgments that is unrelated to the definition of fraud upon the court. If the public interest is jeopardized by according a judgment res judicata effect, a public policy exception to res judicata is warranted whether the underlying proceedings were somehow tainted or not.

A number of authorities urge confinement of *Hazel-Atlas* to its public policy exception niche. See, e.g., 11 Wright & Miller, Federal Practice and Procedure, sec. 2870, p. 253 (1973) (footnotes omitted):

> "Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b). . . . The draftsmen must have conceived of 'fraud upon the court,' as they used that phrase, as referring to very unusual cases involving 'far more than an injury to a single litigant.' "

See also *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d at 668; and see *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551-1552 (11th Cir. 1985); *Great Coastal Exp. v. International Broth, etc.*, 675 F.2d at 1356-1357. While not an entirely satisfactory solution, if *Hazel-Atlas* is not to be overruled it must at least be so confined.

Hazel-Atlas has so blurred the meaning of "fraud upon the court" that a workable definition does not exist,

a problem compounded by the continuing confusion over the intrinsic-extrinsic fraud distinction. The dangers both to individuals and to the legal system from this open-textured approach are illustrated by this case. Strong public policies favor finality of judgments. These policies are directly undermined by the continuing confusion over the meaning, application and scope of *Hazel-Atlas*.

II.

THE NEGATIVE CONSEQUENCES OF HAZEL-ATLAS ARE GREATLY MAGNIFIED BY A CONSTRUCTION PERMITTING A CHARGE OF FRAUD UPON THE COURT TO BE USED AS A VEHICLE FOR RELITIGATING THE MERITS OF THE UNDERLYING ACTION.

If *Hazel-Atlas* supports a claim of fraud upon the court where the losing party alleges perjury sanctioned by counsel—an easy and frequent allegation among losing litigants—the question becomes how to prove the charge. The District Court ruled that Southern Pacific may relitigate the underlying action to attempt to show a fraud upon the court. Although the Ninth Circuit appears not to have addressed this precise issue, every other court that has done so has held that "a party is precluded by res judicata from relitigation in the independent equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action." *Bankers Mortgage Company v. United States*, 423 F.2d 73, 79 (5th Cir. 1970), cert. denied, 399 U.S. 927 (1970) (footnote omitted); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d at 668.

The District Court's order puts the cart before the horse. Instead of requiring Southern Pacific to prove a fraud upon the court by clear and convincing evidence *before* it can relitigate the underlying action, the order permits relitigation of the underlying action in order to prove a fraud upon the court. If Rule 60(b) permits this, any losing party could allege fraud upon the court and simply retry its case to make up for inadequacies in its prior showing. If it makes a better showing, according to Southern Pacific's logic and the District Court's order, this is proof of fraud upon the court.

The legal system cannot tolerate such a construction of Rule 60(b). The courts consistently hold that Rule 60(b) does not afford a vehicle for relitigation of the merits, *Mastini v. American Telephone & Telegraph Company,* 369 F.2d 378, 379 (2d Cir. 1966), cert. denied, 387 U.S. 933 (1967), *Howard v. Burlington Northern, Inc.,* 75 F.R.D. 644, 648 (D.Ore. 1977), for obvious reasons. A party is bound by the doctrine of res judicata unless the judgment is first set aside. Southern Pacific's attempt to relitigate the credibility of a witness, an issue that was necessarily decided in the original trial, must be precluded by the doctrine of res judicata. *Travelers Indem. Co. v. Gore,* 761 F.2d at 1552.

To permit relitigation of the underlying action before a fraud upon the court has been proven not only frustrates the public policies embodied in the doctrine of res judicata, it prevents the defendant from having a fair trial. It is an accepted principle of our jurisprudence (and logic) that two factfinders may reach contrary conclusions on the same evidence. When the jury in the *Kiemele*

action found for the plaintiff, this did not mean it found Southern Pacific was engaged in a fraudulent effort to escape liability. A second jury might reach a different conclusion on liability, but this does not mean such a decision implies a finding of fraud on the part of the plaintiff. It is fundamentally illogical and unfair to permit an inference of fraud to be drawn from an adverse determination on liability, yet that is precisely what the District Court order would do in an attempt to give literal meaning to *Hazel-Atlas*.

The District Court acknowledged that courts "normally are not disposed to allow a party another chance to relitigate factual matters that have been resolved against him." App., p. 2. The court erroneously concluded that the policies which normally preclude relitigation may be escaped merely because fraud upon the court is alleged. This is simply wrong. Every other court to address the issue has held the contrary—"The independent action is not a basis for the relitigation of issues adjudicated by the judgment now sought to be annulled." *Carter v. Dolce*, 741 F.2d 758, 760 (5th Cir. 1984).

A grant of certiorari or mandamus in this instance is appropriate to rectify the continuing confusion surrounding the meaning of Rule 60(b), confusion deriving from the decisions of this Court. A person should not be forced to go to trial on a fundamentally untenable legal theory, especially when the trial proceedings, as determined in advance, will necessarily be unfair to him. This is especially true for an attorney, a target whose reputation and license to practice may be jeopardized by even the most error-laden adverse judgment.

———o———

CONCLUSION

For all the foregoing reasons, we respectfully pray that this Court will review the important issues presented by this case.

Respectfully submitted,

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PETER D. LICHTMAN

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,	)	
Plaintiff,	)	CASE NO.CV 86-5214-WPG
v.	)	MEMORANDUM OF DECISION
BRYON L. KIEMELE, AVERIL D. VALLIER, and AVERIL D. VALLIER, a professional corporation,	)	REGARDING DEFENDANTS' MOTIONS IN LIMINE
Defendants.	)	(Filed January 12, 1988)

In this litigation Southern Pacific Transportation Company ("the plaintiff") contends that the judgment rendered by this court against it in amount of $35,000.00 was obtained as a direct result of fraud upon the court perpetrated by the then plaintiff Kiemele and his attorney, Vallier, (now "the defendants"). The plaintiff now seeks to prove that Kiemele's personal injuries that he successfully attributed to a negligently produced sudden stop of the freight train upon which he was riding, were caused instead by an earlier motorcycle accident, and that Kiemele, himself, intentionally brought about the sudden stop of the train. The plaintiff proposes to show that Vallier, with full knowledge of the foregoing, undertook to help Kiemele perpetrate his fraudulent recovery by filing and prosecuting the action resulting in the aforementioned judgment. The defendants have presented four motions in limine, which have been argued and submitted and now are ruled upon in this memorandum.

1. The first motion seeks an order preventing the plaintiff from relitigating the cause of the sudden stop of the train. Such motion is denied.

It is true that the evidence at the earlier trial indicated that the train was caused to "break in two" because of mishandling by the engineer. It also is true that courts normally are not disposed to allow a party another chance to relitigate factual matters that have been resolved against him. However, a judgment obtained through fraudulent means in which an attorney has participated constitutes a fraud upon the court. *See Great Coastal Express, Inc. v. International Brotherhood of Teamsters etc.*, 675 F.2d 1349, 1357 (4th Cir. 1982). In the present state of the record, I have no opinion upon whether or not the plaintiff can prove what it alleges. However, it must be given the opportunity to try, for the integrity of the judicial process requires that a judgment so obtained must be set aside. This is true even if it were to be concluded that the plaintiff now is trying to make up for inadequacies in its prior inability to show the causation of the break in the train. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

2. The second motion in limine involves principally the use of experts by the plaintiff in the now pending trial. The orders sought are set out at paragraph 59 of the defendants' brief filed September 14, 1987, and are referred to in the corresponding subparagraphs:

(a) The motion is denied for reasons set forth above.

(b) The plaintiff may present as experts at the trial such of the following individuals as it may elect on the issue of causation of the break-in-two of the train:

Gould
Culbertson
Babers
Hicks
Deskin

The direct testimony of such individuals will be prepared in advance in written narrative form. Such narratives may be amended or modified at trial only with permission of the court on good cause shown. Such witnesses will be submitted at the trial for cross-examination on this direct testimony, and they may be examined by the plaintiff on redirect.

Within thirty (30) days following this order, the plaintiff's counsel will:

(1) present to defense counsel a copy of the direct testimony of each expert witness that it intends to present, as indicated above.

(2) make available to defense counsel copies of the reports or results of all simulator tests, computer analysis tests, and any other evidentiary materials upon which the plaintiff or its witnesses intend to rely.

(3) allow defense counsel and/or their experts access to all facilities available to the defendants that would enable the defendants to make their own simulator tests, and will show the defendants how such tests are done.

Within thirty (30) days after receiving the materials and access referred to above, defense counsel may take the depositions of such of the plaintiff's experts as they may elect, and the defendants shall be prepared to

pay to defense counsel reasonable attorney's fees for such time as they may expend in the actual taking of such depositions. At the trial, the court will determine the appropriateness of such fees as defense counsel may request for the taking of such depositions.

(c) The motion is denied in light of subparagraph (b) hereof.

(d) The motion is denied in light of subparagraph (b) hereof.

(e) The motion is denied in light of subparagraph (b) hereof.

(f) I am not aware of the manner in which, if at all, the plaintiff may seek to submit reputation testimony regarding the character of Kiemele. I assume that the relevant Evidence Code provisions are sections 404(a)(3), 404(b) and 403. I shall undertake to evaluate these considerations when or if the occasion arises.

(g) The plaintiff will produce Mr. Babers as a witness at such time as defense counsel may request, or show good reason why it is unable so to do.

3. The third motion in limine urges the striking of the sixth cause of action, which seeks damages against defendant Vallier for having violated his obligation as an attorney under Sections 6068 and 6128 of the California Business and Professions Code, and Rule 7-101 of the Rules of Professional Conduct of the State Bar of California. The defendants insist that violations of these provisions do not give rise to a cause of action by an adversary of the attorney's client. I am not at all sure that this is so.

In *Middlesex Insurance Co. v. Mann,* 124 Cal. App. 3d 558 (4th Dist. 1981), civil liability was imposed upon an insurance broker for violation of provisions of the California Insurance Code. In doing so, the opinion of the court quoted with approval the Restatement Second of Torts, Section 874A:

> "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."

Section 6128 of the Business and Professions Code provides that an attorney is guilty of a misdemeanor who ". . . consents to any deceit or collusion, with intent to deceive the court or *any party.*" (Emphasis supplied.) Thus, it is clear that the purpose of the statute is to protect "any party," even an adversary party, from collusion with intent to deceive. This is precisely what the plaintiff contends occurred here on the part of defendant Vallier, and the statute does not specifically provide a civil remedy. Under the guidance of the quoted provision of the Restatement, I conclude that a civil remedy ". . . is appropriate in furtherance of the purpose of the legislation . . . ." I have some doubt that such a civil remedy is needed here by the present plaintiff, in light of the other causes of action upon which it relies, but it should be avail-

able if the need develops. Accordingly, the motion in limine is denied.

4. The fourth motion in limine would strike the third and fourth causes of action, which allege conversion of the plaintiff's money used to pay the fraudulent judgment, and *indebitatus assumpsit*. The basis for the motion is the contention that these causes of action are improper collateral attacks on the prior judgment. The motion is denied.

As stated earlier in this memorandum, a judgment obtained through fraud upon the court must be set aside. When a judgment is so set aside, the money that has been paid thereunder belongs to the party that paid it. In effect, the party that fraudulently obtained such money has converted it and is holding it contrary to the rights of the defrauded claimant. These are the logical contentions of the third and fourth causes of action.

DATED: January 12, 1988.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AVERIL D. VALLIER, a Professional Corporation, et al.,	)	No. 88-7063
Petitioners,	)	
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER
Respondent,	)	(Filed April 4, 1988)
and	)	
SOUTHERN PACIFIC TRANSPORTATION COMPANY,	)	
Real Party-in-Interest.	)	

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges

The petition for a writ of mandamus is denied. Petitioners have not demonstrated extraordinary circumstances justifying mandamus relief. *Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).

The petitioner's motion for a stay pending disposition of the petition for a writ of mandamus is denied as moot.

(2)

Supreme Court, U.S.
FILED
JUL 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-22

In The

Supreme Court of the United States

October Term, 1988

AVERIL D. VALLIER, AVERIL D. VALLIER, A Professional Corporation, BRYON L. KIEMELE,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Southern Pacific Transportation Company, filing this Brief in Opposition to Petition for Certiorari as Respondent (Real Party in Interest) in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The Southern Pacific Company is the parent of the Southern Pacific Transportation Company.

The following companies are owned jointly between the Southern Pacific Transportation Company and other entities:

Central California Traction Company

The Ogden Union Railway & Depot Company

Portland Traction Company

Sunset Railway Company

Trailer Train Company

St. Louis Southwestern Railway Company

The Southern Pacific Transportation Company does not hold an ownership interest in any other subsidiaries, except for and excluding wholly-owned subsidiaries.

Dated: July 25, 1988.

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No. 88-22

In The

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October Term, 1988

AVERIL D. VALLIER, AVERIL D. VALLIER, A Professional Corporation, BRYON L. KIEMELE,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

Real Party in Interest, Southern Pacific Transportation Company, respectfully opposes the Petition for Writ of Certiorari or Mandamus, filed by Petitioners Averil D. Vallier, Averil D. Vallier, a Professional Corporation, and Bryon L. Kiemele.

STATEMENT OF THE CASE

Southern Pacific agrees with Petitioners' Statement of the Case insofar as it describes the general nature of this case and its procedural history. To a certain extent, however, Southern Pacific disputes Petitioners' characterization of the facts and evidence. Fortunately, it is unnecessary to discuss the relevant facts for purposes of this Opposition.

Two matters of a procedural nature do require brief mention, though. First, a copy of the District Court's written order is properly included within the Appendix section of the Petition. As Petitioners are plainly aware, however, Judge Gray has also made a number of oral rulings, some of which are very germane to the points argued. So that this Court will have a more complete picture of the case as it now stands, the transcript of proceedings on June 6, 1988, is reproduced in the Appendix to this Brief.[1]

Second, the order from which this Petition is directly taken was entered by the Court of Appeals back on April

---

[1] The first ruling made on June 6 is especially relevant to Petitioner's argument that the District Court has " . . . put[] the cart before the horse." (Petition, p. 13) In fact, the issues are to be tried on a bifurcated basis. Initially, the Court will hear evidence limited to the threshold question of whether a fraud on the court was perpetrated. If Southern Pacific does not meet its burden of proof on that issue, the trial will be concluded. Otherwise, Southern Pacific will be allowed to proceed with its case on the secondary matter of whether, and to what extent, it was damaged by that fraud. Only then would it be offering proof regarding the issues previously tried in the underlying case.

4, 1988. Thus, the 90-day period for filing the Petition would normally have expired on July 3, 1988. (28 U.S.C. § 2101(c).) However, July 3 was a Sunday, and the following day was a national holiday. Technically speaking, then, the Petition was timely received by the Clerk on July 5. (U.S.S.C. Rule 29.1.)

That Petitioners waited until the last possible day would usually make no difference. It seems curious, though, that this happened to coincide with the commencement of this Court's summer recess. Southern Pacific suspects that this timing was deliberate, calculated in some manner to cause a further postponement of the trial, which is now set to begin on September 6. Although Petitioners have not requested a stay or supersedeas from this Court, it is anticipated that they will seek a continuance from the District Court pending a ruling on this Petition. These, obvious tactics should not be condoned. If at all possible, Southern Pacific respectfully requests that the Petition be determined on an expedited basis.

SUMMARY OF ARGUMENT

Southern Pacific brought this action to rectify the harm it suffered when Petitioners obtained a judgment by means of an egregious fraud on the court. Trial is presently scheduled to commence in the District Court on September 6, 1988.

In their attempt to escape that trial, Petitioners have advanced a number of related arguments designed to cast doubt on the legal basis for Southern Pacific's claim. For

present purposes, it is unnecessary to address those arguments in any detail. Petitioners have simply failed to demonstrate proper grounds for certiorari under the guidelines of U.S.S.C. Rule 17.

Moreover, their Petition is premature. The issues raised have never been addressed on their merits in the Court of Appeals. Should Petitioners sustain an adverse judgment after trial, the normal appellate process may be relied upon to assure proper and orderly review. On the other hand, if Petitioners obtain a defense judgment, the issues will have become moot.

Finally, Petitioners have failed to show the type of "extraordinary circumstances" which would justify mandamus relief.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO DEMONSTRATE GROUNDS FOR CERTIORARI UNDER U.S.S.C. RULE 17

A. The Summary Denial Of Mandamus Relief By The Court Of Appeals Represents Neither A Decision On The Merits Nor One Which Conflicts With Established Law.

U.S.S.C. Rule 17 provides three guidelines for measuring when review by certiorari is warranted. The first guideline concerns any decision by a federal court of appeals which (1) creates a split of authority within the federal court system, (2) which conflicts with state court decisions on a federal question, or (3) which reflects a significant departure "from the accepted and usual

course of judicial proceedings." None of these circumstances is presented in this case.

On April 4, 1988, the United States Court of Appeals for the Ninth Circuit denied Petitioners' application for writ of mandamus. That was the only ruling in this case by a federal court of appeals. Notably, the issues argued by Petitioners were not considered on their substantive merits. Instead, the Court of Appeals merely denied the application on grounds that Petitioners had " . . . not demonstrated extraordinary circumstances justifying mandamus relief." Thus, no major issues were decided which represent a conflict with the rulings in any other circuit. Moreover, this discretionary ruling was entirely consistent with the established limitations on mandamus relief. (*Kerr v. United States District Court* (1976) 426 U.S. 394, 402-403, 48 L.Ed.2d. 725, 732-733.)

B. This Case Does Not Involve Any State Court Proceedings.

The second guideline under Rule 17 pertains to decisions by a "state court of last resort." All proceedings in this case have been within the federal court system. There have been no rulings or involvement by any state court.

C. The Court Of Appeals Merely Denied Mandamus Relief For Lack Of Extraordinary Circumstances, And Did Not Decide Any "Important Question Of Federal Law."

The third and final guideline under Rule 17 deals with "important question[s] of federal law" decided by either a state court or a federal court of appeals. Again, the only ruling by a federal court of appeals in this case was the summary denial of mandamus relief on April 4,

1988. No "important question of federal law" was decided by that ruling.

II.

REVIEW BY CERTIORARI WOULD BE PREMATURE AT THIS STAGE OF THE PROCEEDINGS

A. The Issues Raised Have Never Been Addressed On Their Merits By The Court Of Appeals.

As noted above, the Court of Appeals did not address the merits of Petitioners' arguments, but simply denied mandamus relief on the threshold ground that there appeared no "extraordinary circumstances." Consequently, if this Court were to examine, those merits under the instant Petition, it would be the first appellate tribunal to do so. In terms of sound judicial administration, this would be very inefficient. The federal judiciary is carefully structured to promote orderly review at ascending levels of appeal. Assuming that Southern Pacific prevails at trial, Petitioners will be entitled to pursue their appellate remedies. The Court of Appeals would then have an *appropriate* opportunity to deal with the issues on their merits, and its decision may very well obviate any need for further review.

Under truly exceptional circumstances this Court may find good reason to overlook these considerations and accept a case which had not been fully determined by the Court of Appeals. (See, e.g., *Schlagenhauf v. Holder* (1964) 379 U.S. 104, 111-112, 13 L.Ed.2d 152, 159-160.) No such circumstances are evident in this case.

At first blush, there may appear one similarity with *Schlagenhauf;* Petitioners are suggesting that F.R.C.P. Rule

60(b) requires interpretation and clarification. (*Schlagenhauf* involved a construction of F.R.C.P. Rule 35.) Still, Petitioners have not raised an issue "of first impression" concerning an asserted "usurpation of power" by the trial court, such as was found to justify immediate Supreme Court attention in *Schlagenhauf*. (379 U.S. at 111, 13 L.Ed.2d at 159.) Instead, Petitioners are attempting to resurrect questions which have already been dealt with extensively in other cases. Notably, their principal argument is based upon the 44-year-old decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944) 322 U.S. 238, 88 L.Ed. 1250, as well as upon two cases decided in the last century. (*United States v. Throckmorton* (1878) 98 U.S. 61; *Marshall v. Holmes* (1891) 141 U.S. 589.) No issue of a new or novel character is presented.

Moreover, the District Court's ruling in this case was entirely consistent with established law. Without belaboring the point, Southern Pacific intends to prove that the underlying judgment was not merely tainted with perjury, but also that a member of the federal bar had knowingly contrived to present that false testimony. Such misconduct by an attorney represents a fraud on the court. (*Nix v. Whiteside* (1986) 475 U.S. 157, 168-169, 89 L.Ed.2d 123, 135-136.) Rule 60(b) clearly authorizes an independent action in equity to alleviate the wrongful consequences of a judgment that was procured by such a fraud. (See *Virgin Islands Housing Authority v. David* (3rd Cir., 1987) 823 F.2d 764, 766-767; *Great Coastal Exp. v. International Broth., Etc.* (4th Cir., 1982) 675 F.2d 1349, 1357; *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.* (6th Cir., 1976) 536 F.2d 1115, 1119; *Kupferman v. Consolidated Research & Mfg. Corp.* (2nd Cir., 1972) 452 F.2d 1072,

1078.) "A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony." (*Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.* (4th Cir., 1987) 827 F.2d 984, 986. Cf. *Keys v. Dunbar* (9th Cir., 1969) 405 F.2d 955, 957-958.) The questionable distinction between "intrinsic" and "extrinsic" fraud is simply of no consequence where the fraud is committed by an officer of the court.

The relevant law is now well-settled. There appears no need for this Court to intervene in these proceedings, especially at the present time. No exceptional circumstances are disclosed which would justify a departure from the normal sequence of appellate review.

B. Should Petitioners Obtain A Defense Judgment At Trial, The Issues Will Have Become Moot.

The historic reluctance of this Court to address moot issues is not merely based upon the fundamental requirements of justiciability. That policy also furthers the essential goals of judicial integrity and efficiency.

In this case, it may very well become unnecessary to contend with the arguments presented in this Petition. Should Southern Pacific fail to prove its claim at trial, the theoretical basis for that claim will no longer present an issue in controversy. In that event, the entire matter will have become moot.

Accordingly, review by certiorari at this point in time would represent a potentially needless exercise. Judicial resources would be better spent in dealing with issues that are truly ripe for determination.

C. On The Other Hand, If Petitioners Suffer An Adverse Judgment At Trial, They Could Then Seek Proper Appellate Review.

Obviously, the denial of certiorari at this stage would not foreclose later review if Petitioners sustain an adverse judgment at trial. When that occurs, they could pursue their appellate remedies in the normal manner, and would be assured full consideration of their arguments in the Court of Appeals. Depending upon the outcome of that appeal, a subsequent petition to this Court might then be timely and appropriate. (Southern Pacific does not mean to suggest, however, that these issues would ever be of sufficient importance to justify this Court's attention. Again, the relevant law is well-settled.)

III.

PETITIONERS HAVE AGAIN FAILED TO DEMONSTRATE SUCH EXTRAORDINARY CIRCUMSTANCES AS WOULD WARRANT MANDAMUS RELIEF

As an alternative to certiorari, Petitioners request that this Court issue a writ of mandamus in the exercise of its original jurisdiction. In support of this unusual request, Petitioners complain that " . . . [a] person should not be forced to go to trial on a fundamentally untenable legal theory, . . . " (Petition, p.14.) As was recognized by the Court of Appeals, however, the mere prospect of trial is not a valid basis for mandamus relief.

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. [Citations.]" *(Kerr v. United States District Court, supra,* 426 U.S. at 402, 48 L.Ed.2d at 732.)

> "It is, of course, well settled, that the writ [of mandamus] is not to be used as a substitute for appeal [citation], even though hardship may result from delay and perhaps unnecessary trial [citations]. The writ is appropriately issued, however, when there is 'usurption of judicial power' or a clear abuse of discretion [citation]." *(Schlagenhauf v. Holder, supra,* 379 U.S. at 110, 13 L.Ed.2d at 159.)

Once again, Petitioners have not demonstrated any substantial reason for circumventing the normal and established procedures for appellate review.

CONCLUSION

For all of the foregoing reasons, Southern Pacific submits that Petitioners have failed to establish any sound basis for immediate review, either by writ of certiorari or writ of mandamus. The instant Petition should therefore be denied.

Respectfully submitted,

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APPENDIX

(p.1) UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE WILLIAM F. GRAY, JUDGE PRESIDING

- - -

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff, vs. AVERIL D. VALLIER, ET AL., Defendant.	)	CASE NO. CV 86-5214-WPG

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, JUNE 6, 1988

ROGER D. MAY, CSR, CM, RPR
Official Court Reporter
402-A United States Courthouse
312 North Spring Street
Los Angeles, California 90012

(p.2) APPEARANCES:

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(p.3) HEARING: Defendant's motion in limine re: (1) Structure of trial; (2) Election of remedies; (3) Exclusion of evidence re July 1979 accident; (4) Exclusion of expert testimony (Lilly Barry).

Filing and spreading Order of Court of Appeals.

* * *

(p.4) Los Angeles, California, Monday, June, 6, 1988
10:00 A.M.

(Other matters heard)

The Clerk: Item No. 6, CV 86-5214-WPG, Southern Pacific Transportation Company versus Averil D. Vallier, et al.

Counsel, please state your appearances.

Mr. Cummins: Joe Cummins for the plaintiff.

Mr. Lichtman: Peter Lichtman for the defendant.

The Court: Well, gentlemen, Mr. Cummins, you say that a plaintiff may bring a fraud action and be entitled to a jury trial, but the fraud here is a fraud upon the court.

Mr. Cummins: It is –

The Court: And my view is that that is a matter for the court to determine. Now, if I determine that there was

a fraud upon the Court, then the next issue is what damages are you entitled to, and you should be entitled to a jury trial in that respect.

Mr. Cummins: Yes.

The Court: But if I determine that there has not been a fraud upon the court, then that's that.

Mr. Cummins: I still question whether or not it's for the jury to determine whether or not there is a fraud on the railroad. I would concede there's –

The Court: Well, but that – no, the jury once determined that there was not a fraud upon the railroad, but he (p.5) was entitled to recover. And I'm not going to open that up again except to protect the institution of the court.

Mr. Cummins: And if I understand Your honor, you think that the sole question, sole issue, apart from damages –

The Court: Yes.

Mr. Cummins: – Is the equitable one of fraud on the court. If there is, and it carries over so that the plaintiff railroad could prove damages.

The Court: That's right.

Mr. Cummins: All right. I won't argue with that.

The Court: All right. Then we'll bifurcate it; we'll decide whether or not there has been a fraud upon the court.

Mr. Cummins: Right.

The Court: If there has, then you'll be entitled to have a jury to determine your damages.

What about that Mr. Lichtman?

Mr. Lichtman: Your Honor, I'm in full agreement with that except for one point; that is, that Mr. Cummins has not preserved his jury right with respect to the legal issues, that is, the conversion and the assumption count. Under federal rule of civil procedure 38, Mr. Cummins did not include that as a demand in his prayer and his complaint, nor ten days after filing of the complaint, nor ten days after the last pleading.

The Court: Did you fail to demand a jury, Mr. Cummins?

(p.6) Mr. Cummins: That's correct, your honor, and I could really not care that much on those issues. I think if the court would prefer to have the jury direction or jury assistance, then the court has discretion to do it, but I'm certainly not insisting upon it.

The Court: All right. Years ago in one of my first cases in federal court, I neglected to demand a jury in connection with a pleading – I was used to the state court practice – and I think it was Judge Westover had sympathy with me, so he nonetheless said he forgave me for that and said that I could late demand a jury.

Later on the court of appeals in another case said you can't do that, and I don't need an advisory jury – you're either entitled to a jury or you're not. You're not entitled to a jury; therefore, the court will try the issues. All right, that's the first.

Second, with respect to requiring the plaintiff to make a pre-election as the whether or not he's suing for

conversion or tort. I agree with Mr. Cummins. This is not common law pleading. If he can show he is entitled to recover, I couldn't care less whether it's under tort or under contract.

Mr. Lichtman: Your Honor, I'm not too excited about this particular issue, simply bacause – and this is what I was just going to get up to clarify. If your Honor has indicated that he will bifurcate this trial, that is, try the equitable (p.7) claim first, which I think he has.

The Court: Yes.

Mr. Lichtman: Then I don't see we even get to this issue, because we're going to try the fraud on the tort issue first. I would just respectfully request that I argue that or keep that in abeyance.

The Court: All right. Third, I agree, Mr. Cummins, that I'm not disposed to have evidence with respect to the 1979 railroad action. That's the one where they ran into the rear of the train up ahead of them and the engineer was killed.

Mr. Cummins: Yes, your Honor.

The Court: Well, I don't see any relevance there.

Mr. Cummins: I don't see any either, but I think instead of a blanket order that there can be no relevance, that if something does become relevant, and the defendant brings it in, it might be relevant. That's all I'm asking.

The Court: Well, without further order of court, there will be no evidence taken or no further reference made to that 1979 action. How about that?

Mr. Cummins: Fine.

Mr. Lichtman: Fine, your Honor.

The Court: Next, the expert evidence. This is not a jury trial. I'm making the self-serving statement that I've had some experience with the state bar of California. I know something about the disciplinary processes. But I would be (p.8) glad to have expert help with respect to what are the specific obligations of an attorney when somebody tells him that, or who, if the plaintiff is right, who pursued an action knowing, at least being informed by the plaintiff that it was a fraudulent action. What are his duties? I'm not disposed to deny the opportunity of Ms. Barry to give some testimony. I may be influenced by it or I may not. But I think I have discretion there in that respect to allow such testimony, and I do not now preclude it.

How about that, Mr. Cummins?

Mr. Lichtman: Your Honor, just a point, that is that Mr. Cummins and Plaintiffs, or Plaintiff, I should say, has argued that Ms. Barry not testify as to the meaning of law, but instead will offer an expert opinion as to the duties of a member of the state bar when representing a client.

The Court: Yes.

Mr. Lichtman: And I think that's what your Honor is leaning towards.

The Court: Yes.

Mr. Lichtman: My problem with that is – and we have, based on your prior rulings, we have some assistance in that regard – is we have the direct testimony of

Ms. Lilly Barry, and I have asked your court, I have lodged it with Your Honor, to take judicial notice of it. It's going to be read based on Your Honor's prior ruling. She'll simply get up on the stand (p.9) and read this narrative statement into the record.

The Court: What is that? Where did that come from? I haven't seen that.

Mr. Lichtman: Well, this is the direct testimony of Ms. Lilly Barry who Mr. Cummins, based on your prior order, has exchanged with me as we have exchanged our expert narrative statements.

The Court: Oh.

Mr. Lichtman: So I take issue with the characterization by Mr. Cummins, since precisely in her narrative statement, which he indicates that she will allude to, does not allude to, and in fact she says, and I'm going to refer to – I can direct Your Honor's attention, if Your Honor doesn't have it, I have an extra copy and I can present this to . . .

The Court: Just tell me.

Mr. Lichtman: What she basically says is she says that the allegations made by Mr. Fitzgerald are true, then I believe Mr. Vallier violated California business and professions code sections, and she lists the sections and the rules of professional conduct. But by doing that, she's right in instructing this court as to what has been violated, which under the case law we have cited cannot be done.

The Court: What about that, Mr. Cummins?

Mr. Cummins: I think that's a shorthand method of (p.10) saying the fact, under those facts, he's violated his duties.

The Court: All right. Look, I will not exclude her direct testimony, but I'll make them all mine as to what does or does not constitute a violation of the rules of professional conduct of the state.

Mr. Lichtman: Your Honor, that's all I request.

May I just additionally request that I preserve my right, my objection at the time of trial to object to her testimony coming in, and based upon those opinions, that's all. I don't want to waive anything right now.

The Court: You're not waiving anything, but I am not granting your motion to exclude her testimony.

Mr. Lichtman: I understand. I'll just reserve my right to object at that time. Thank you, Your Honor.

Your Honor, we have another point. I'm sorry. Based on what Ms. Beard has communicated to me, and I'm sure she has to Mr. Cummins, evidently the trial date, which was scheduled for tomorrow has been kicked.

The Court: I regret that, but it's of necessity.

Mr. Lichtman: May I respectfully request that the court set this matter for trial the first week of September. I have checked with Ms. Beard; she's looked at her calendar and indicated that the court is clear on the week of September 6.

The Court: I'll give you a preference; is that satisfactory?

(p.11) The Clerk: It shows it clear.

Mr. Cummins: I'd prefer to get it tried sooner.

Mr. Lichtman: I would love it myself, Your Honor, however –

The Court: Gentlemen, I'm in trouble with my wife, and I'm going to have to try a major case involving the computer industry in San Jose beginning next week, and it will probably go well into if not through July, and I promised to take the month of August for a vacation, and I'll try you early in September, and I know we'll get it done early because we're going to go to Russia on the 25th of September. But I'll give you a priority.

Mr. Lichtman: I would request the week of September 6th.

The Court: All right. Is that Labor Day?

Mr. Lichtman: Right after.

The Clerk: The day after.

The Court: All right. The Tuesday after Labor Day. Is that satisfactory, Mr. Cummins?

Mr. Cummins: Yes, it is, Your Honor.

The Court: That will be the order, minute order will suffice.

Mr. Lichtman: One other point: because of the continuance and because of the difficulty I've had in subpoenaing these witnesses, who have agreed to appear and sign (p.12) an adknowledgment under the subpoena, may I continue those subpoenas in full force and effect?

The Court: Yes, of course.

Mr. Lichtman: Instead of having to resubpoena these people. It's very difficult.

The Court: Yes, of course. Let them know, however.

Mr. Lichtman: I will. Thank you, Your Honor.

The Court: Gentlemen, is there any reason why the mandate of the court of appeals denying as moot – let me see – denying petition for writ of mandamus and denying the motion for stay is moot should not be spread on the record of this court?

Mr. Cummins: There's no reason, Your Honor.

Mr. Lichtman: Your Honor, at this point in time, I just wish to inform the court we will be filing a petition for certain to the U.S. Supreme Court.

The Court: All right. But there's no reason why I should not spread that record?

Mr. Lichtman: I see no reason. It will not bar us.

The Court: All right. That will be the order.

(Hearing Concluded)

(p.13) (I certify that the foregoing is a correct transcript of the above-entitled matter)

/s/ Roger D. May
ROGER D. MAY, CSR. CM, RPR DATE: 7-6-88